

**A Hong Leong Bank Bhd v Teh Moh Eng (Chong Ah Ng,
intervener)**

B HIGH COURT (JOHOR BAHRU) — EXECUTION APPLICATION
NO 38–1099 OF 2002
KAMARDIN HASHIM JC
20 MARCH 2009

C *Land Law — Charge — Sale of land — Sale by auction — Setting aside,
application for — Monies of auction sale paid directly to bank as chargee —
Whether monies should have been paid and forwarded to court — Whether
payment to bank for benefit of defendant — Whether defendant's interest
D prejudiced — Whether injustice would befall intervener if application allowed —
National Land Code s 259(3)*

E The plaintiff had given a housing loan to one Chee Kim Swee ('the
borrower'). As security for the said housing loan, the defendant, the title
owner of the subject property, created a charge. As there had been default in
the repayment of the loan, the property was sold by public auction. The
successful bidder was the intervener herein. At all material times, from the
hearing for the order for sale on 27 November 2001 until the auction on
F 5 August 2008 the defendant had never appeared in court or filed any
application to contest or challenge the proceedings. Nevertheless the
defendant subsequently applied to set aside the sale vide public auction dated
5 August 2008. The plaintiff resisted the said application. The defendant's
application was also strongly objected by the intervener. The defendant's
G main contention was that the monies for the auction sale should have been
paid and forwarded to the officer of the court and not directly to the bank
as chargee of the said property thus breaching s 259(3) of the National Land
Code.

H

Held, dismissing the defendant's application with costs:

- I** (1) The public auction held on 5 August 2008 was perfectly in order. There
was no prejudice to the defendant. Further, the order of sale dated 29
September 2006 remained valid and enforceable as it was never set-aside
by any party. It is noted that once an order is made by the court it is
binding and valid until set aside (see para 17).
- (2) The arrangement of payment directly to the bank as chargee was wholly

for the benefit of the defendant and there was absolutely no prejudice to the defendant's interest. Further to that, the defendant had never appeared in any of the proceedings nor filed any application to object the arrangement. The defendant had been served with the application and had kept silent for about two years before awakening from his slumber to file this application. The defendant failed to show that he had suffered or his interest impeached for the court to assist him (see para 18).

A

B

- (3) If the court were to allow the defendant's application then the injustice would befall the intervener who was a bona fide purchaser without notice and had paid the purchase price in full (see para 19).

C

[Bahasa Malaysia summary]

Plaintif telah memberikan pinjaman perumahan kepada Chee Kim Swee ('peminjam'). Sebagai cagaran kepada pinjaman perumahan tersebut, defendan, pemegang hakmilik tanah tersebut, telah mewujudkan gadaian. Oleh kerana terdapat kegagalan pembayaran balik pinjaman tersebut, harta tersebut telah dijual secara lelongan awam. Pembida yang berjaya merupakan pencelah di sini. Pada semua masa material, semenjak perbicaraan untuk perintah jualan pada 27 November 2001 sehingga lelongan pada 5 Ogos 2008 defendan tidak pernah hadir di mahkamah atau memfailkan apa-apa permohonan untuk menentang atau mencabar prosiding tersebut. Walau bagaimanapun defendan kemudiannya memohon untuk mengeneipkan jualan melalui lelongan awam tersebut yang bertarikh 5 Ogos 2008. Plaintif menentang permohonan tersebut. Permohonan defendan juga telah dibantah secara tegas oleh pencelah. Penghujahan utama defendan adalah bahawa wang untuk jualan lelong sepatutnya telah dibayar dan dihantar kepada pegawai mahkamah dan bukannya terus kepada pihak bank sebagai pemegang gadaian harta tersebut dan oleh itu melanggar s 259(3) Kanun Tanah Negara.

D

E

F

G

Diputuskan, menolak permohonan defendan dengan kos:

H

- (1) Lelongan awam yang diadakan pada 5 Ogos 2008 adalah teratur. Tidak wujud prejudis terhadap defendan. Selanjutnya, perintah jualan bertarikh 29 September 2006 kekal sah dan boleh dikuatkuasakan kerana ia tidak pernah diketepikan oleh mana-mana pihak. Adalah dinyatakan bahawa apabila sesuatu perintah dibuat oleh mahkamah ianya adalah mengikat dan sah sehingga diketepikan (lihat perenggan 17).
- (2) Pengurusan pembayaran secara terus kepada bank sebagai pemegang gadaian adalah seluruhnya untuk manfaat defendan dan tidak terdapat

I

- A prejudis sama sekali terhadap kepentingan defendan. Selanjutnya, defendan tidak pernah hadir dalam mana-mana prosiding ataupun memfailkan apa-apa permohonan untuk membantah urusan tersebut. Defendan telah diserahkan dengan permohonan tersebut dan telah mendiadakan diri untuk tempoh lebih kurang dua tahun sebelum
- B memfailkan permohonan ini. Defendan gagal menunjukkan bahawa dia telah mengalami kerugian atau kepentingannya dicabar untuk mahkamah membantunya (lihat perenggan 18).
- (3) Jika mahkamah membenarkan permohonan defendan ini maka
- C ketidakadilan akan menimpa pencilah yang merupakan seorang pembeli bona fide tanpa notis dan telah membayar harga belian sepenuhnya (lihat perenggan 19).]

Notes

- D For cases on sale of land, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2444–2446.

Cases referred to

- E *Puah Bee Hong & Anor v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601, SC (refd)
- Wong Yuen Hock v Ban Hin Lee Bank Bhd & Anor* [2002] 4 MLJ 193; [2002] 4 CLJ 99, CA (refd)

Legislation referred to

- F National Land Code ss 254, 259(3), Form 16D
National Land Code (Amendment) Act 2001 s 257(1)(f)
- MK Ong (KM Ong, Lee & Co) for the applicant/defendant.*
KP Ng (Zaid Ibrahim & Co) for the respondent/plaintiff.
- G *Ivy Quek Jin Tan (Leng & Co) for the intervener.*

Kamardin Hashim JC:

PRELIMINARY

- H [1] This was an application by the defendant in encl 45 for an application to set aside the sale vide public auction dated 5 August 2008. The defendant's application is supported by an affidavit in support of the defendant himself dated 29 September 2008 in encl 44 stating grounds for the application. The
- I plaintiffs resisted the application and filed an affidavit in reply, in encl 51, affirmed by the credit controller manager of the plaintiffs bank. The defendant's application also strongly objected by the buyer who bought of the property at the public auction who was allowed in the earlier proceeding to become the intervener in this matter. The intervener affidavit in support of

an earlier application to intervene in the matter and to object to defendant's application as in encl 48.

A

BACKGROUND FACTS

[2] The plaintiff is a bank incorporated in Malaysia ('the bank'). The bank had given a housing loan to one Chee Kim Swee ('the borrower'). As security for the said housing loan, the defendant, the title owner of the subject property known as HS(D) 15187 PTD No 12169 Mukim Plentong, Daerah Johor Bahru, Negeri Johor ('the said property'), created a charge ('a third party charge') under the National Land Code ('NLC') for the benefit of the bank. The said charge was presented as Perserahan No 60440/97 Jilid 4051 Folio 94 on 15 August 1997.

B

C

[3] On or about December 1998, the borrower defaulted in his repayment obligations. The bank had issued and served a Form 16D pursuant to s 254 of the NLC to notify the defendant/chargor of the default. As there was no repayment from either the borrower or the defendant/chargor, the bank proceeded to file this present proceeding to enforce their rights under the charge as provided for by the NLC.

D

E

[4] Subsequently, an order for sale was granted on 27 November 2001. Pursuant to the said order for sale, the bank had applied for directions for the public auction of the said property. The first auction was conducted on 9 July 2003 but was unsuccessful due to no bidder. The second auction was conducted on 17 January 2006 however it was also unsuccessful due to no bidder.

F

[5] On 14 September 2006, the bank again applied to the court for another auction to be fixed. In the application, the bank sought to reduce the reserve price, change of name of the plaintiff from Hong Leong Finance Bhd to Hong Leong Bank Bhd and also for a prayer that all monies for the deposit as well as the balance of the purchase price are to be forwarded to the bank directly. The application was served on the defendant on 20 September 2006. Affidavit of service of the same dated 26 September 2006 was filed on the same day. The honourable court granted an order in terms to the bank's application on the 29 September 2006.

G

H

[6] The third auction of the said property was held on 11 January 2007. However, it was again unsuccessful due to same reason that there was no bidder.

I

[7] On 13 March 2007, the bank applied for another auction. The application was served on the defendant on 7 June 2007. An affidavit of

A service dated 28 June 2007 was filed as proof of service. Order was granted by the court on 31 July 2007 and the auction date was fixed on 11 December 2007. Again, the fourth auction on 11 December 2007 was unsuccessful due to no bidder.

B [8] On 28 January 2008, the bank once again applied for a new auction to be fixed. The application was served on the defendant on 18 June 2008. The affidavit of service was filed. The honourable court again granted the order as prayed and fixed 5 August 2008 as the auction date.

C [9] The fifth auction was held on 5 August 2008 and was successfully sold at the price of RM298,000. The successful bidder was the intervener herein. The reserve price was originally set at RM243,000.

D [10] On 9 October 2008, the defendant applied to declare the sale vide the public auction on 5 August 2008 as null and void.

[11] At all material times, from the hearing for the order for sale on 27 November 2001 until the fifth auction on 5 August 2008, the defendant
E had never appeared in court or file any application to contest or challenge the proceedings.

ISSUES RAISED BY THE DEFENDANT

[12] The defendant's argument in applying to set aside the sale of the said property vide public auction on 5 August 2008 is contained in paras 10 and 11 of his affidavit in support of the application stating that the monies for the auction sale should have been paid and forwarded to the officer of the court and not directly to the bank as charge of the said property thus breaching s 259(3) of the NLC.

THE PLAINTIFF'S REPLY

[13] The plaintiff's counsel submitted that the procedure for the payment of the monies have been approved by this honourable court vide court order dated 29 September 2006 pursuant to the plaintiff's application dated 14 September 2006. In the affidavit supporting the plaintiff's application dated 14 September 2006, it was averred that the change from payment to 'Hakim Kanan Mahkamah Sesyen' to the bank directly was for the benefit of the defendant as once the monies received by the bank, it would be immediately be credited to the borrower's account thus reducing the total sum outstanding and accruing interest. The said order dated 29 September 2006 remains valid and enforceable as it was never set-aside by any party, including the defendant.

[14] Counsel for the plaintiff further submitted that their application was made in light to the amendment of the NLC vide Act A1104 National Land Code (Amendment) Act 2001 which came into effect on 1 December 2001 whereby new para (f) of sub-s (1) of s 257 was inserted as follows:

(f) specify that where the full amount of the purchase price is not paid after the fall of the hammer by the successful bidder, the sum specified in paragraph (e) shall be paid as deposit to the charge and forthwith credited into the account of the charger pending the settlement of the balance of the purchase price.

[15] In this regard, the plaintiff's application is in consonant to the amendment of the NLC which was designed to benefit the chargor (defendant).

[16] The plaintiff's counsel submission was duly supported and adopted by the intervener. It was submitted that there was no injustice and no prejudice occurred to the defendant. It is a 'plus point' to the defendant when the monies paid directly to the bank into the defendant account. As all documents had been in order and duly served on the defendant, there is no reason in allowing the defendant application to set-aside the sale. Furthermore, the intervener had fully paid the purchase price of the said property to the bank into the defendant credit and it will bring hardship and prejudice to the intervener had the sale being set-aside by the court.

FINDINGS OF THE COURT

[17] The defendant's main contention that the monies for the auction sale of the said property should be paid to the court instead directly to the bank. The defendant's argument is based on the assumption that the order for sale was granted on 27 November 2001 that is three days before the amendment to the NLC vide Act A1104 came into effect. This assumption by the defendant was a wrong assumption as the order by the court was on 29 September 2006 that is a long way after the amendment came into effect. The public auction held on 5 August 2008 was perfectly in order. This court totally agree with the whole submissions of the plaintiff's counsel and the intervener's counsel in this case. This court agree that there was no prejudice to the defendant. As the order of sale dated 29 September 2006 remains valid and enforceable as it was never set-aside by any party. It is noted that once an order is made by the court it is binding and valid until set aside. In the case of *Puah Bee Hong & Anor v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601, the then Supreme Court states thus:

- A We are of the considered view that an order of the supreme court such as the High Court, even if it is eg, an order obtained ex parte or a default judgment; until it is set aside, must be obeyed by everyone whether its validity is challenged or not, and it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless
- B and until the order is discharged; per Romer LJ in *Hadkinson v Hadkinson*. This passage was quoted with approval and adopted by this court in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd*. It was stated in *Isaacs v Robertson* that it was misleading to describe such an order of competent jurisdiction as void or voidable, for every order must be obeyed until it was set aside and 'these are not orders which are void ipso facto without the need for proceedings to set them aside'. One of the reasons is that such a superior court must be presumed to have the jurisdiction to make an order which it has made. Every order made by a superior court must be regarded as an order of a competent jurisdiction.
- C
- D [18] The arrangement of payment directly to the bank as charge is wholly for the benefit of the defendant and there is absolutely no prejudice to the defendant's interest. Further to that, the defendant had never appeared in any of the proceedings nor file any application to object the arrangement. It was not in dispute that the defendant had been served with the application and had kept silent for about two years before awakening from his slumber to file
- E this encl 45. The defendant seek intervention from this court to prevent injustice that the defendant had suffered or his interest impeached. Nevertheless, the defendant here has shown none of these criteria for this court to assist him.
- F
- G [19] If this court were to allowed defendant application then the injustice will be befall on the intervener who was a bona fide purchaser without notice and had paid the purchase price in full. In the case of *Wong Yuen Hock v Ban Hin Lee Bank Bhd & Anor* [2002] 4 MLJ 193; [2002] 4 CLJ 99, where Alauddin Mohd Sheriff JCA (as he then was) penned:
- H Before concluding we may add that as the learned judge had rightly decided that the second respondent was a bona fide purchaser without notice and had paid the purchase price in full, in our judgment, he certainly was entitled to possession of the said land. In this respect we need only refer to the case of *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 2 CLJ 15 where it was held by the then Supreme Court that in an auction, the vendor is regarded as having divested himself of all the beneficial interest in this land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.
- I

[20] In the result, for all the reasons adumbrated above, I dismissed the defendant's application in encl 45 with costs.

Defendant's application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed

A

B

C

D

E

F

G

H

I